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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 230

SAMUEL H. MOSS, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Samuel H. Moss, Inc., prays that a writ of certiorari be issued to review a decree of the Circuit Court of Appeals for the Second Circuit, entered in this cause on April 17, 1945, which affirmed an order of the Federal Trade Commission requiring it to cease and desist from discriminating in price between purchasers of made-to-order rubber stamps.

Opinion Below

The opinion of the Circuit Court of Appeals (R. 424-427) is reported in 148 F. (2d) 378.

Jurisdiction

The decree of the Circuit Court of Appeals was entered and filed on April 17, 1945 (R. 429-430). The jurisdiction of this Court is invoked under Section 11 of the Clayton

Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether Sections 2 (a) and 2 (b) of the Clayton Act impose upon a person, accused of unlawful price discrimination, the burden of proving that the effect of the discrimination may not be substantially to lessen competition or may not be to tend to create a monopoly or may not be to injure, destroy or prevent competition with a competitor, upon the mere proof by the Federal Trade Commission that the accused sold a commodity at different prices to different customers.

2. Whether injury to competition within the meaning of Section 2 (a) of the Clayton Act is made out merely by proof that, in a highly competitive business, a competitor lost a particular sale to a customer who was quoted a lower price by a person trying to get the sale and not trying to drive the competitor out of business.

3. Whether a merchant who sells his wares to different customers in different parts of the United States at different prices is guilty per se of unlawful price discrimination under Section 2 (a) and Section 2 (b) of the Clayton Act.

4. Whether Congress intended by Section 2 (a) and Section 2 (b) of the Clayton Act to make it unlawful, where a buyer solicits sealed competitive bids, for a merchant to sell his wares to that buyer at his bid price if it is lower than the prices he obtained in prior or other sales, unless the lower price did not actually undercut the competitors' bid prices.

5. Whether a defense of meeting competition under Section 2 (b) of the Clayton Act is not made by proof that the lower prices were made in order to meet anticipated com-

petition of aggressive competitors, or that the lower prices were based on the verbal statements of buyers that competitors were offering to sell at equally low or lower prices.

6. Whether the Federal Trade Commission did not commit reversible error in refusing to allow petitioner to make out its defense that its lower prices were made in good faith to meet equally low prices of competitors.

7. Whether petitioner was denied a fair and impartial hearing in violation of its constitutional rights because of the Federal Trade Commission's refusal to permit it to prove that certain competitors who were formerly its employees were underselling it in a manner that caused petitioner, in good faith, to meet their equally low prices.

8. Whether a statute can be constitutional if it is interpreted to mean that in the absence of a requirement of proof of an unreasonable restraint of trade, either by a substantial lessening of competition or a tendency to create a monopoly, a seller can be forced to sell to his customers at the same prices or can be forced only to meet his competitor's price and not attempt to beat it, or can be forced to continue to observe the first price he fixes for his merchandise, or can be forced to find out his competitor's price before fixing his own price.

Statute Involved

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the pur-

chases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales

under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Statement

Samuel H. Moss, Inc., petitioner herein, is engaged in the highly competitive business of manufacturing and selling commercial marking devices known as rubber stamps.* As such it is in competition throughout the United States with hundreds, if not thousands, of other manufacturers of rubber stamps. In New York City, where petitioner has its place of business, it has no less than thirty-two competitors (R. 45-47). Anyone with a vulcanizer, a drill and a saw can engage in the business of making and selling rubber stamps (R. 206).

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* Rubber stamps are of two types: "made-to-order" stamps and "ready-made" or "stock" stamps. The "made-to-order" stamps are made in accordance with the customer's special copy, while the "stock" stamps contained commonplace, often-used words, such as "Paid", "Rush", "Received", "Answered", etc. The complaint herein (R. 2-7), the stipulation (R. 12-16) and the findings as to the facts (R. 17-29), refer only to the "made-to-order" rubber stamps, but the order to cease and desist (R. 30-32) is by its language applicable to rubber stamps generally.

The Federal Trade Commission brought this proceeding pursuant to Section 11 of the Clayton Act, charging the Moss Company with violating Section 2 of that Act as amended by the Robinson-Patman Act, in that in the course and conduct of its business it had unlawfully discriminated in price between different purchasers of made-to-order rubber stamps of like grade and quality.

The Commission, aided by a stipulation, proved that in the highly competitive rubber stamp industry, petitioner sold made-to-order rubber stamps to eight particular customers at lower prices than it was selling the same stamps to other customers. Some of these sales were secured by petitioner on the basis of sealed bids in competition with other stamp manufacturers (R. 164, 337-338); and in some of these sales, as well, petitioner's lower prices were the result of statements by the customers that its competitors were offering to sell to them for less (R. 343, 384-385). The eight instances were, nevertheless, incorporated in its findings, on the basis of which the Commission ordered petitioner to cease and desist from discriminating among different purchasers in alleged violation of Section 2 (a) of the Clayton Act (R. 30-32).

On petition to review, the Circuit Court of Appeals for the Second Circuit affirmed the order of the Commission on the specific grounds that the Commission, having proved that petitioner had, in the eight instances, sold made-to-order rubber stamps to eight particular customers at lower prices than it was selling similar stamps to other customers, the order was warranted because "*petitioner* did not prove *affirmatively* that the discrimination did *not* lessen competition or tend to prevent it; nor did it prove that its lower prices were only 'to meet an equally low price of a competitor.' On the contrary, it did not know its competitors' prices, but merely 'bid low enough to get the business.'" (R. 425).

In justifying its conclusion that the statute imposed such a drastic, impossible, affirmative burden on the accused, the court below also said:

> "It is true that § 2 (a) makes price discrimination unlawful only in case it lessens, or tends to prevent, competition with the merchant who engages in the practice; and that no doubt means that the lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere. But that is often hard to prove; the accuser must show that there were competitors whom the higher of the two prices would, or might, not have defeated, but who could not meet the lower. Hence Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result. If he can prove that the lower price did not prevent or tend to prevent anyone from taking away the business; he will succeed, for the accuser will not then have brought him within the statute at all" (R. 425).

Insofar as the defense of meeting competition is concerned, the Court disregarded proof that the petitioner's lower prices were quoted: (1) in an attempt to meet anticipated competition, and (2) as a consequence of statements by buyers that competitors were selling at equally low prices; and also disregarded the fact that the prices were in some of the instances incorporated in sealed competitive bids. It held, in effect, that such excuses for the lower prices were insufficient but that the accused must prove affirmatively that he did "not undercut his competitor's price."

Another point considered by the Circuit Court of Appeals (R. 426-427) was whether the Commission had committed reversible error by reason of the fact that its trial

examiner had refused (R. 297-299) to permit petitioner to question the owner of a competing company and others, as to whether that company and others had competed with petitioner for the business of each of the eight customers cited by the Commission in its findings. Having throttled petitioner at the very threshold of this crucial testimony, it was argued to the Circuit Court of Appeals that the Commission had made it impossible for petitioner to prove that its lower prices were fixed to meet the equally low prices of competitors.

It was also contended below that the statute commanded the Commission to allow this defense to be proved by providing in Section 2 (b):

> "That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor. * * * "

Petitioner's counsel, who tried the case before the Commission, made it evident in his offer of proof that he expected to show petitioner's former employees were underselling it, that is as he said soliciting "our customers at prices they knew they could get it for" (R. 295). Moreover, these customers were the very customers referred to in the stipulation and the Commission's findings.

The Circuit Court of Appeals, while criticizing the Commission for its "strictness" in refusing to admit the evidence offered, rejected petitioner's contention on the ground that its attorney did not make it clear in his offer of proof that the witnesses would testify that petitioner's offers were no lower than its competitors. Yet the offer of proof demonstrates the fact that had the trial examiner permitted the question to be asked and answered, the required evidence would have been elicited.

Specifications of Errors to Be Urged

The Circuit Court of Appeals erred:

(1) In construing Section 2 (b) of the Clayton Act as putting upon the respondent before the Commission the burden of proving affirmatively that the effect of sales to certain purchasers at lower prices might *not* be substantially to lessen competition, or might *not* be to tend to create a monopoly in any line of commerce, or might *not* be to injure, destroy or prevent competition with it.

(2) In construing Section 2 (b) of the Clayton Act as shifting to the person "who sets two prices" the burden of proving that the lower price "did not prevent or tend to prevent anyone from taking away the business."

(3) In holding that the effect on competition, required to be proved under Section 2 (a) of the Clayton Act as an integral part of unlawful price discrimination, is a "justification" which must be affirmatively shown by the respondent under Section 2 (b) of the Act.

(4) In holding that a "*prima facie*" case under Section 2 (b) of the Clayton Act is made out by proof that a respondent "sold rubber stamps to some of its customers at lower prices than it was selling the same stamps to other customers."

(5) In holding that the defense of meeting competition under Section 2 (b) of the Clayton Act cannot be made out unless respondent can show that he actually "did not undercut his competitors" and that it is insufficient that respondent's lower prices were set to meet anticipated competition or were fixed in response to buyers' statements as to what competitors were quoting.

(6) In failing to hold that under Section 2 (a) of the Clayton Act, it is not enough for the Commission to prove mere discrimination in price but that the Commission must also prove that the discrimination had the unlawful effects defined in that section.

(7) In failing to hold that where prices are submitted in the form of sealed bids in competition with other manufacturers, there can be no violation of Section 2 (a) of the Clayton Act, and that in such case the defense of meeting competition under Section 2 (b) of the Clayton Act has been made out.

(8) In failing to hold that the Commission committed grievous and reversible error and did not accord to petitioner a full, fair and impartial hearing in refusing to permit petitioner to introduce evidence that its competitors solicited the business of the eight customers set forth in the Commission's findings and that its lower prices to these customers were fixed in order to meet equally low prices of competitors.

(9) In holding that petitioner's attorney who tried the case did not offer to prove "that the offers which it made were in fact no lower than that of its competitors" when the attorney explicitly declared that he wanted to show that competitors solicited its "customers at prices they knew they could get it for" (R. 295); i.e. by undercutting petitioner, for otherwise they could not get the customers away from it.

(10) In failing to hold Section 2 (a) and Section 2 (b) unconstitutional and void if construed to apply to the instant case.

(11) In affirming the Federal Trade Commission's order to cease and desist.

Reasons for Granting the Writ

1. This case presents a serious question as to the meaning of Section 2 (b) of the Clayton Act, which is of vital importance to all merchants in the United States and which has not been, but should be, settled by this Court.

The Circuit Court of Appeals for the Second Circuit has held that upon mere proof by the Federal Trade Commission that a respondent has sold to two customers at different prices, the respondent has the burden of affirmatively proving "that the lower price did not prevent or tend to prevent anyone from taking away the business" and "did not lessen competition." Such an interpretation misreads Section 2 (b). To impose upon the accused the burden of disproving one of the essential ingredients of the substantive offense with which he is charged—a conception so directly contrary to our fundamental principles of justice—requires the most positive and direct language on the part of Congress.

Reading Section 2 (a) and Section 2 (b) together, as they must be, since the latter merely prescribes certain procedure in proving before the Commission the offense described in Section 2 (a), it is evident that Congress intended no such deprivation of fundamental rights as the Circuit Court of Appeals' decision ascribed to the legislative branch.

Section 2 (b) imposes upon a respondent the burden of proving affirmatively one of the several justifications by which discriminations, even though they substantially lessen competition, tend to create a monopoly or injure, destroy or prevent competition with the discriminator, may yet be excused. These justifications to which Section 2 (b) alludes are in the nature of pleas in "confession and avoidance" and refer to the meeting of a competitor's price as set forth in Section 2 (b) and to the content of the provisos in Section 2 (a), as, for example, where lower prices are

due to "price changes in response to changing conditions affecting the market for or marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescense of seasonal goods, distress sales under court process or sales in good faith. in discontinuance of business in the goods concerned."

The word "justification" in Section 2 (b) does not refer to the effect on competition which is an integral part of the substantive offense of unlawful price discrimination under Section 2 (a). For without one of the prescribed adverse effects on competition, there just is no offense.

Section 2 (b) cannot be read as a statute complete in itself. A *prima facie* case cannot be made out without proof that the sales in question, or at least one of them, was in interstate commerce. Yet Section 2 (b) nowhere refers to this jurisdictional prerequisite; it is found in Section 2(a) as is the effect on competition. Just as the Commission and not the respondent must prove affirmatively that interstate commerce is involved, so must the Commission prove affirmatively that the effect of respondent's lower price might be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition with a competitor.

The decision of the Circuit Court of Appeals in placing upon the accused merchant the burden of proving "affirmatively that the discrimination did not lessen competition or tend to prevent it" has created an obstacle that in the ordinary course of trade is impossible for him to overcome. The Court erroneously assumes that the merchant knows or can find out the competing prices of all of his competitors as well as the effect of his lower price on the ability of each of his competitors to compete. Competition, the life blood of trade, does not take place under glass. It is still a struggle of the contending forces and Congress did

not intend to impose a different economy on American business through the enactment of the Robinson-Patman Act. Nor did Congress intend that a merchant who sells his goods at different prices in the daily battle for business was guilty of unlawful price discrimination.

Inasmuch as a merchant will rarely be in a position to overcome the burden that is not rightly his, the Circuit Court has used Section 2(b), a procedural device, to modify the substantive offense created in Section 2(a). By its decision the lower court has therefore, in effect, made every merchant who sells his wares at different prices guilty, *per se*, of unlawful price discrimination. Such a decision is of the greatest concern to every American merchant and the question involved is so serious that it should be settled by this court.

2. The decision below may seriously hinder the future administration of the Clayton Act and is, moreover, in conflict with decisions of other Circuits and of this Court.

The so-called anti-price discrimination section of the Clayton Act (Section 2 (a)) has been invoked by the Federal Trade Commission in over one hundred instances since its amendment by the Robinson-Patman Act on June 19, 1936. The complaints cover every conceivable industry in every part of the United States. Section 2 (b) which prescribes the Commission's procedure in proving the complaints is consequently of tremendous importance in the administration of the statute. American business has a great stake in a workable construction of the statute.

There have been very few decisions by the courts regarding Section 2 (b). Yet because of the importance of this section, it is the very paucity of its judicial treatment which makes the decision below loom so large in the administration of the law and makes its review by this Court so imperative.

In not one of the previous rulings involving Sections 2 (a) and 2 (b) either in the Seventh Circuit, in the cases of *Corn Products Refining Co.* v. *Federal Trade Commission,* 144 F. (2d) 211, *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 135 F. (2d) 453, 144 F. (2d) 221, or in the Sixth Circuit in the case of *E. B. Muller & Son, Inc., et al.* v. *Federal Trade Commission,* 142 F. (2d) 511, or in this Court's opinions in the *Corn Products* and *Staley* cases, 324 U. S. —— and ——, decided April 23, 1945, was Section 2 (b) interpreted as by the Second Circuit Court below to require the respondent to prove affirmatively that his lower price "did not prevent or tend to prevent anyone from taking away the business" and "did not lessen competition or tend to prevent it."

In each of the foregoing cases the courts by their analyses of the proof made it evident that they regard the burden of proof in this important respect as being upon the Federal Trade Commission.

As a matter of fact, in the first decision in the *Staley* case, 135 F. (2d) 453,* the Seventh Circuit said specifically that it was not enough for the Commission to prove mere discrimination in price but that the Commission must also prove that this lessened competition. The lower court here admitted that it did not agree with the Seventh Circuit and said:

> "We are not sure that our interpretation accords with the rulings of the Seventh Circuit in *A. E. Staley Manufacturing Co.* v. *Federal Trade Commission,* 135 Fed. (2) 453; S. C. 144 Fed. (2) 221. In the first of these the court said (p. 455) that it was not enough to prove mere discrimination in price, but that the Commission must also prove that this lessened com-

* This first decision was not involved in the Supreme Court's determination, 324 U. S. ——. It was the second decision, 144 F. (2d) 221, which followed a remand to the Commission that was reviewed by this Court.

petition; and for this it relied upon *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, decided before the amendment of 1936. Indeed, the decision appears actually to have turned upon the Commission's failure affirmatively to prove that the discrimination had lessened competition. To that we cannot agree for the reasons we have given." (R. 426.)

In the second opinion in the *Staley* case, 144 F. (2d) 221, the Seventh Circuit said "that the discriminations were such as may be substantially to lessen competition or tend to create a monopoly" and that "It is clear, therefore, that a *prima facie* case of unlawful price discrimination was made out."

The Supreme Court's decision, reversing the *Staley* case, 324 U. S. ——, in no way affected this reasoning, for in fact this Court also demonstrated that the "*prima facie*" case referred to in Section 2 (b) consists of more than proof of sales at different prices. It first held that the discriminations there involved were unlawful because they had "the defined effect upon competition" and only then considered whether the respondent had rebutted "the Commission's '*prima facie*' case."

The lower court has declared, however, that the Commission can make out a *prima facie* case merely by proof of sales at different prices; that thereupon there is shifted to the respondent the burden of proving that the price discrimination did not lessen or tend to "prevent competition with the merchant who engages in the practice."

Should the Commission follow the opinion of the Court below, its administration of the Clayton Act would be contrary to its own convictions. The Commission has never considered its burden under Section 2 (b) fulfilled by mere proof of sales at different prices. *Its argument to the court was not that respondent had failed to prove affirmatively that the discriminations did not lessen competition*

but that it, the Commission, had proved that the discriminations "injured competition."

The Second Circuit's decision is thus contrary to every other decided case and contrary to the Commission's present practice in administering the Clayton Act. Furthermore, it is a decision that is fraught with dangers to every American merchant since he must be prepared to prove himself *not guilty* of unlawful price discrimination, when accused by the Commission. This Court's review of the decision below is of the greatest public importance.

3. This case also presents a question as to the meaning of Section 2 (a) of the Clayton Act which is of general and serious importance and which has not been, but should be, settled by this Court.

The statutory requirement that the effect of the lower price must be of such a nature as to injure, destroy or prevent competition with the person granting the discrimination, has been held by the Circuit Court to be satisfied by a competitor's loss of a particular sale.

Petitioner submits, firstly, that the statutory requirement must include the word "substantially" with which the entire clause dealing with the effect on competition is prefixed. In the interest not only of grammar but of justice, this is necessary. Otherwise the loss of one sale in an insignificant amount would be sufficient. The diversion of trade must rise to a degree which affects the public before it can be considered as having an adverse effect on competition.

As was held in this Court's opinion in the *Corn Products* case, 324 U. S. —, it is not the mere possibility of lessening competition at which the statute is aimed, but it was intended "to reach those which would probably have the defined effect on competition." There can be no such probability in the instant case.

In the next place, the statute refers to injury to *competition,* not to injury to a competitor. In a highly competitive industry such as the rubber stamp industry, where a competitor loses and gains orders as a common practice, it can hardly be said that the loss of a single sale constitutes an injury to *competition.* On the contrary, a loss of a sale to a competitor who quotes a lower price, actually *fosters,* rather than injures, competition.

4. This case also involves the important question of whether the defense of meeting a competitor's price, referred to in Section 2 (b), is made out: (1) by proof that the customer was quoted by sealed bids, and (2) that the lower prices were (a) in response to information from the buyers that competitors were quoting equally low or lower prices, and (b) in anticipation of possible competition from aggressive competitors. Disregarding these questions so vital to American business, the Court below held that the defense of meeting a competitor's price can only be made out by proof that the accused has not undercut his competitor. *Such a ruling would make it necessary for a merchant to know his competitor's price before he could quote a lower price, and would put the merchant on the horns of a dilemma, for if he unknowingly undercuts his competitor's price, he violates Section 2 (a) of the Robinson-Patman Act and if by an arrangement he finds out his competitor's price and lowers his price only to meet it, he may be violating the Sherman Act, a criminal statute.* Congress did not intend that a merchant should be placed in such a precarious position.

5. The Circuit Court's decision sustaining the action of the Commission's trial examiner in excluding vital testimony offered to prove that petitioner's lower prices were made to meet the equally low prices of competitors should be reviewed by this Court, for it concerns the conduct of a very important administrative agency and sanctions a

deprivation to petitioner of a full and fair opportunity to meet the Commission's charges.

The specific questions excluded by the examiner were preliminary questions to a competitor as to whether he solicited the business of the eight customers cited by the Commission in its findings (R. 297-299). Having been thwarted at the very inception of this line of questioning, no opportunity was afforded petitioner of proving the prices quoted by its competitor and that these prices were as low as its own. Plainly this was the clear intention of petitioner's attorney. The offer of proof shows that the competitors were undercutting petitioner, for their prices would have to be lower in order for them to solicit its customers "at prices they knew they could get it for." (R. 295.)

Since the statute imposes upon the accused merchant the burden of proving affirmatively that its lower price was fixed to meet the equally low price of a competitor, it is of the utmost importance that the Commission should place no obstacles in the path of the merchant seeking to overcome this burden and to prove his defense. Administrative law is not a one way street permitting to the agency the widest latitude in the submission of its evidence, yet at the same time compelling the case to be tried with "strictness" insofar as the accused's proof is concerned. The lower court, although it sharply criticized the Commission for its undue "strictness" and pointed "out the danger of conducting such a proceeding in such a spirit" nevertheless did not reverse the order nor remand the case for additional testimony. Its argument that "In the case at bar, it chances that no injustice was done," is illogical and unsound since the court is merely hazarding a guess as to the nature of the evidence that could have been developed had the trial examiner permitted the questions to be answered. The offer of proof and the questions demonstrated that the required

evidence would have been elicited had the Trial Examiner permitted the line of questioning.

This court should, in the interest of the proper conduct of all administrative agencies, review and reverse the lower court's refusal to consider the Commission's trial examiner's exclusion of relevant and vital testimony as depriving the petitioner of a full, fair and impartial hearing which the statute provides and the United States Constitution guarantees.

6. Finally, this case presents the question of whether Section 2 (a) of the Robinson-Patman Act as interpreted by the Circuit Court of Appeals, is not in violation of the commerce clause (Article 1, Section 8) and of the due process clause (5th Amendment) of the Constitution. This Court should decide whether, in the absence of a requirement of proof of an unreasonable restraint of trade either by a substantial lessening of competition or a tendency to monopoly, a statute can validly force a seller to sell to his customers at the same prices, or force him only to meet his competitor's price and not attempt to beat it or make him continue to observe the first price he fixes for his merchandise, or force him to find out his competitor's price before fixing his own price.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted.

HENRY WARD BEER,
Attorney for Petitioner,
Samuel H. Moss, Inc.

Dated: New York City, July —, 1945.

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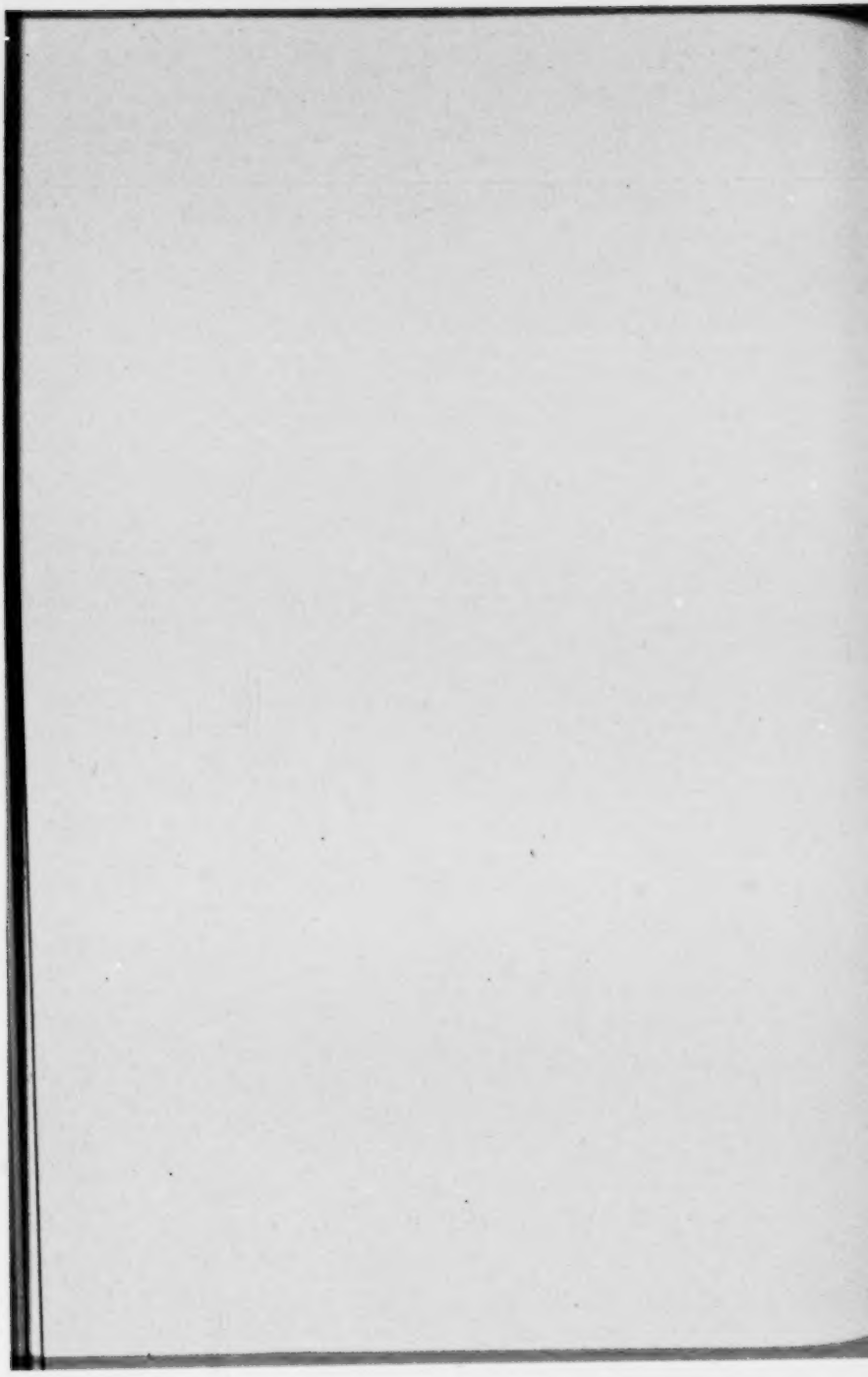

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 230

SAMUEL H. MOSS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 424) is reported in 148 F. 2d 378.

JURISDICTION

The decree of the Circuit Court of Appeals was entered April 17, 1945 (R. 429). The petition for a writ of certiorari was filed July 14, 1945. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the evidence supports the findings of the Federal Trade Commission that petitioner's discriminations in price between different purchasers of its rubber stamps did, or tended to, substantially lessen competition with petitioner in the sale of rubber stamps and otherwise injure, destroy or prevent such competition.

(2) Whether the justification of price discrimination permitted by Section 2 (b) of the Clayton Act, that the discriminator's lower price was made in good faith to meet the equally low price of a competitor, can be established without showing any sale by a competitor at as low a price as the lower price of the price discriminator.

(3) Whether a ruling by the Commission excluding evidence offered by petitioner constitutes reversible error.

STATUTE INVOLVED

Section 2 (a) and (b) of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. § 13, provides:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption,

or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons en-

gaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

The Federal Trade Commission brought this proceeding under Section 11 of the Clayton Act charging petitioner with violating Section 2 of that Act as amended by the Robinson-Patman Act of June 19, 1936. The case was heard on stipulated facts (R. 12–16, 35–38, 269–274) and on oral evidence taken on behalf of both the Commission and petitioner. On the basis of this evidence the Commission made findings of fact of which the following are pertinent:

Petitioner manufactures made-to-order rubber stamps which it sells to customers in various States in substantial competition with other vendors of such stamps and in the course of such commerce it sells goods of the same grade and quality to some customers at lower prices than it sells them to others (R. 19–20).

Typical of such price discriminations are sales of made-to-order stamps, three inches in length and 3/8 inches in height, made to eight concerns (counting separately the sales to Linde Air Products Co. at Chicago and to it at San Francisco). In each case petitioner's price was below prices which it was charging to other purchasers, and was substantially lower than the price at which a competitor had been previously selling to the company receiving the benefit of petitioner's discriminatory price and operated to divert the trade of the favored purchaser from such competitor (R. 21–26). One competitor, whose sales to the

General Electric Company had been 90% of the competitor's business, was unable to meet petitioner's price to General Electric, a price below the cost of manufacture, and was forced to discontinue its rubber stamp business (R. 26).

The range of petitioner's prices in concurrent sales of such three-inch stamps was wide even among the favored purchasers, as shown by the following (R. 26–27):

Customer	Price first line	Price each additional line
General Electric Co.	4¢	1¢
New York, New Haven & Hartford Railroad	4¢	4¢
Prudential Insurance Co.	6¢	2¢
Oxweld Acetylene Co.	10¢	7¢
Linde Air Products Co.	10¢	7¢
American Airlines Inc.	13¢	13¢
New Britain National Bank [1]	15¢	10¢

[1] Petitioner's sales to this company continued until the end of 1938 or the early part of 1939 (R. 25) and were concurrent only as to some of the other companies listed.

Petitioner concurrently sold stamps of the same size and quality to other purchasers at prices, for the first line, of 5¢, 7¢, 8¢, 15¢, 20¢ and 30¢, plus a charge for each additional line (R. 27).

Petitioner's price differences were material and their effect was and may be substantially to lessen competition with petitioner and to otherwise injure, destroy or prevent such competition (R. 27). Petitioner's lower prices were not made in good faith to meet an equally low price of a competitor and there was no evidence that petitioner's differences in price were based upon differences in cost resulting from the differing

methods or quantities in which its rubber stamps were sold or delivered to various purchasers (R. 27–28).

The Commission concluded that petitioner was violating Section 2 (a) of the Clayton Act and it entered an order directing petitioner to cease and desist from unlawful discrimination in prices in the interstate sale of its rubber stamps (R. 28–29, 31–32).

The court below affirmed the Commission's order in a *per curiam* opinion. The court held that the evidence warranted the Commission in finding that petitioner's discriminations in price had effects on competition which under the provisions of Secton 2 (a) of the Clayton Act, made the discriminations unlawful; that petitioner, having offered no evidence that a competitor had in any instance sold to any of petitioner's favored purchasers at a price as low as petitioner's price to such purchaser, had failed to establish the defense to price discriminations permited by Section 2 (b) of the Act, that the discriminator's lower price was made in good faith to meet an equally low price of a competitor; and that no injustice had been done by the Commission's rejection of certain evidence, not shown to be relevant, offered by petitioner (R. 425–427).

ARGUMENT

1. The court below apparently interpreted the Act as meaning that upon mere proof by the

Federal Trade Commission that a respondent before the Commission had sold to two customers at different prices, he has the burden of affirmatively proving that the discrimination did not lessen competition or tend to injure or prevent it (R. 425). Although a respondent undoubtedly has the burden of proving the various justifications listed in the provisos in Section 2 (*supra*, pp. 3–4), the Commission has always construed the Act to require it as part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition. The petition for certiorari correctly states (pp. 15–16) that the Commission's argument in the court below "was not that respondent [petitioner here] had failed to prove affirmatively that the discriminations did not lessen competition but that it, the Commission, had proved that the discriminations 'injured competition' ". In seemingly attributing a different position to the Commission, the court below apparently misunderstood the Commission's argument.

Nevertheless, the decision below is clearly right for the reasons advanced by the Commission. The Commission introduced evidence showing that the discriminatory prices charged by petitioner—ranging from 4 to 30 cents for the same product (R. 36–37)—diverted business from competitors (R. 269–274) and forced at least one competitor out of business (R. 192–200). The Commission made findings of fact to this effect (R. 26–28) which are unchallenged, and concluded that the

effect of the price discrimination was substantially to lessen competition with petitioner and to injure and prevent such competition (R. 27–28). If, as assumed by both parties in the court below and in this Court, the burden of introducing evidence as to this element of the offense rests on the Commission, the evidence described fully satisfies the statutory requirement.

Since the result reached by the court below is right under the construction of the statute urged by petitioner and applied by the Commission, there is no occasion for further review in order to determine what in this case is an academic question. A judgment will not be disturbed because "the lower court relied upon a wrong ground or gave a wrong reason". *Helvering* v. *Gowran,* 302 U. S. 238, 245, and cases cited; *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80, 88. And see the denial of certiorari in *Indianapolis* v. *Wheeler,* 318 U. S. 781.

2. Section 2 (b) of the Clayton Act authorizes a seller to justify a price discrimination by showing that his lower price was made in good faith to meet the equally low price of a competitor. Petitioner urges (Pet. 17) that the case presents the important question of whether this defense is made out by proof that the seller's lower price was in response to verbal statements from buyers that competitors were quoting equally low or lower prices and in anticipation of their com-

petition.[1] This Court settled such question adversely to petitioner in *Federal Trade Commission* v. *Staley Mfg. Co.*, No. 559, October Term 1944, slip op. 9–11, and in *Corn Products Refining Co.* v. *Federal Trade Commission*, No. 680, October Term, 1944, slip op. 11. In so far as the *ratio decidendi* of the court below differs from the foregoing later decisions by this Court, the latter will be a guide to the court below in future cases involving defenses under Section 2 (b).

3. Petitioner contends (Pet. 17–19) that the court below erred in sustaining the action of the Commission in excluding certain evidence offered by petitioner in support of its defense under Section 2 (b). The Commission's examiner refused to allow petitioner's counsel to question the officer of a competitor (operated by two persons who had been employees of petitioner 14 years earlier) as to whether this company had competed with petitioner for the business of certain companies to which petitioner sold at discriminatory prices (R. 293–299). We submit that the testimony sought to be elicited was properly ruled to be irrelevant. Since it

[1] The question of establishing a defense under Section 2 (b) by proof that the lower price was offered in a sealed bid, referred to by petitioner, is not presented. The opinion below does not discuss this question and it is irrelevant since petitioner offered such proof (R. 337–338) as to only one of the numerous instances of discriminatory prices shown by the evidence.

had no tendency to show that petitioner had knowledge of the competitor's prices or that they were as low as petitioner's lower discriminatory prices, it would not tend to show that petitioner's lower prices were made "in good faith" to meet the equally low prices of a competitor. In any event, a purely evidentiary ruling presents no general question of law meriting review by certiorari.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 230

SAMUEL H. MOSS, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION.

PETITION FOR REHEARING

HENRY WARD BEER,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 230

SAMUEL H. MOSS, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION.

PETITION FOR REHEARING

Now comes the above named petitioner, Samuel H. Moss, Inc., and respectfully presents this, its petition and prays for a rehearing of its petition for a Writ of Certiorari herein and in support thereof shows:

The petition for Writ of Certiorari, filed July 14, 1945, was denied October 8, 1945.

Petitioner submits that in denying the petition for Writ of Certiorari, the Court has apparently overlooked a number of tremendously and vitally important questions that are here involved. Of such great moment are these questions that if the opinion and decision of the Court below remain unreviewed and unreversed, it may truly be said that the competitive system of the country, as we have known it, will actually cease to exist.

The denial of the Writ is detrimental not only to petitioner but to all other merchants in the United States subject to the Clayton Act as amended by the Robinson Patman Act, all of whom have a very important stake in the outcome of this proceeding.

Summary of Matters Apparently Overlooked by Court

1. The admission by the Solicitor General (in his brief in opposition to the granting of certiorari) that the Court below erred in arriving at its conclusion, *per se*, warrants Certiorari.

2. The lower court's conceded error establishes that petitioner has had no judicial review of the sufficiency of the evidence to support the Commission's findings of injury to competition upon which its order must be based.

3. The lower court's opinion cannot be left unreviewed in its present state for it can only serve to confuse rather than guide American business.

4. Section 2(a) of the Clayton Act, as here interpreted, is unconstitutional for it makes of the statute an instrument to destroy competition. As interpreted, the practices prohibited are in no wise inimical to competition or interstate commerce and consequently Section 2(a) is not within the authority of Congress under the commerce clause of the Constitution.

5. Section 2(b) of the Clayton Act, insofar as it refers to the justification of price discrimination "by showing that his lower price * * * was made in *good faith* to meet *an equally low* price of a competitor," is violative of the *due process* clause of the Constitution because this provision of the statute places an impossible burden upon the seller, is impractical, unworkable, unrealistic, naive and absurd. The statute offers absolutely no guide to

enable the seller to know, in advance of the sale, whether he will be deemed to have acted in "good faith" so as to be free of prosecution.

6. The lower court's opinion on the question of meeting competition under Section 2(b) is so confusing as to offer no directives whatever to American business seeking to comply with the law.

7. The Solicitor General's statement that the *Staley* and *Corn Products* opinions settled the question of price discrimination presented in the instant case is erroneous and may have unfairly influenced the Court to deny Certiorari.

8. This Court apparently overlooked the fact that in five of eight instances of discrimination, stamps were sold by sealed, secret competitive bids. The lower Court's decision and this Court's denial of certiorari doom competitive bidding.

9. The lower court's opinion upholding the Commission's refusal to permit petitioner to prove its defense of meeting competition has worked a serious miscarriage of justice and amounts to a denial of due process of law which this Court should rectify.

Summary Statement

The Circuit Court of Appeals affirmed the Commission's order directing petitioner, a rubber stamp manufacturer, to cease and desist from discriminating in price among its customers in violation of Section 2(a) of the Clayton Act, on the following grounds:

(a) That the Commission having proved that Moss sold rubber stamps to eight customers at different prices, and Moss having failed to prove affirmatively that it did not as a result thereof "lessen competition or tend to prevent it,"

the court held the Commission's findings of lessening of competition were "supported by evidence."

(b) The lower Court then held that Moss had failed to justify the discrimination because it did not show that the lower prices did not undercut its competitors' price and did "not prove that in any of the instances its prices were no lower than that of its competitors."

(c) Finally the Circuit Court decided that the trial examiner's exclusion of testimony whereby Moss sought to prove that in *all* of the instances its prices were no lower than its competitors, while unnecessarily strict, was proper because "it chances that no injustice was done."

The Solicitor General in his brief in opposition to certiorari, conceded that the lower court's principal ground for sustaining the Commission's order, i. e., that Moss had failed to prove affirmatively that it did not lessen or tend to prevent competition, was *completely erroneous.* Nevertheless, in the face of this admission, he argued that the order was rightly affirmed because *he* said that the Commission has proved that the discriminations lessened competition.

It was also stated in the Solicitor's brief that even if the lower court was equally wrong on its other ground, that the justification of meeting competition had not been made out, still certiorari was unnecessary because of this Court's decisions on this question in the cases of *Federal Trade Commission* v. *Staley Mfg. Co.,* No. 559, October Term, 1944 (decided April 23, 1945), and in *Corn Products Refining Co.* v. *Federal Trade Commission,* No. 680, October Term 1944 (decided April 23, 1945).

In the Solicitor's opinion, too, the exclusion of evidence was properly ruled to be irrelevant; in any case, said he, it is a purely evidentiary ruling.

I

The Solicitor General's Admission That the Lower Court Erred Warrants Certiorari

The brief of the Solicitor General, filed on behalf of the Federal Trade Commission in opposition to the petition for a Writ of Certiorari, demonstrated that petitioner's application was well founded. He there admits (pp. 7-9) that the opinion of the lower court was erroneous and that said court's principal basis for its decision was unfounded. As we have shown, the lower court's reason for affirming the Commission's order was that Moss had failed to prove affirmatively that it did not lessen or tend to prevent competition. The Solicitor agrees that this was error and admits that the "Commission has always construed the Act to require it as part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition." Since therefore it is agreed that the basic reason given by the lower court for affirming the order was in error, it is submitted that certiorari should have been granted so that a proper judicial determination may be had.

II

The Circuit Court's Conceded Error Established That Petitioner Has Had No Day in Court on Sufficiency of Commission's Evidence. The Lower Court Never Passed On Evidence Before It.

Despite the Solicitor General's admission of serious error on the part of the lower court, he opposed the granting of certiorari because *he said,* although without any evidence to support him, that the Federal Trade Commission had proved that the discriminations in the instant stamp case

"may lessen or tend to injure competition." After making the admission of error, he further argues that since the result reached by the Circuit Court, viz. the affirmance of the order to cease and desist, was right "under the construction of the statute urged by petitioner and applied by the Commission (and) there is no occasion for further review in order to determine what in this case is an academic question." In other words, the government is saying that despite the fatal error and false reasoning employed by the court below, yet no review should be permitted petitioner because *in the Solicitor's opinion*, the result in favor of the Commission was correct.

The Solicitor General's contentions are so demonstrably superficial and specious, they should not be permitted to defeat certiorari.

The opinion of the lower court makes it very evident that petitioner has never had its day in court on the most important question in the case, namely: Did the Commission sustain the burden it admittedly has of proving as required by Section 2(a) of the Clayton Act, that the effect of the eight instances of discrimination "may be substantially to lessen competition or tend to create a monopoly or to injure, destroy or prevent competition with" petitioner.

The Solicitor General informed this Court in his brief that the Commission had sustained this burden and had proved that the discriminations "may lessen or tend to injure competition." But this is merely a gratuitous and self-serving statement on his part, which was not decided by the Circuit Court of Appeals, as the opinion shows. This Court's denial of Certiorari, based presumably upon its acceptance at face value of the Solicitor General's assertion that the Commission had actually proved its case, would seem to disregard the injustice which has here been meted out to petitioner.

The erroneous reasoning of the Circuit Court inevitably resulted in that court's circumvention of the all important question of the sufficiency of the Commission's evidence. That court held that upon proof (by stipulation) that petitioner in eight instances, sold rubber stamps at different prices, the burden was upon it to prove "affirmatively that the discrimination did not lessen competition or tend to prevent it."

It is now conceded by the Solicitor General that the court was utterly wrong on the question of proof. Yet that error led it on to a more fundamental error which this court has overlooked. It was because the Circuit Court erroneously believed that petitioner had not sustained its burden that they held that the Commission's findings that the discrimination "had a tendency to induce the purchase of (Moss') rubber stamps by various users thereof and have tended to and do divert trade to (Moss) from its competitors" was "supported by evidence." *The lower court made no appraisal of the evidence* to determine whether the findings were supported by the evidence because under their mistaken theory the Commission's proof as to the effect of the discrimination was unessential.

Thus it is incontrovertible that the Circuit Court held that the findings were supported not by the Commission's proof but rather on that court's admittedly erroneous premise that petitioner had failed in its proof. Consequently the Solicitor General's contention in his brief to the Court that the Commission had proved the effect of the discrimination as required by the statute is merely an expression of his own opinion, which should not have influenced this Court in arriving at its decision denying certiorari. This Court ought not accept the Commission's self serving statement that it has proved its case as equal to and the equivalent of actual *proof* that it has proved its case.

Had the court below not erred, as it concededly did, petitioner would have obtained a decision on the indispensable issue as to whether the Commission's proof was sufficient to sustain its findings and order. This petitioner did not get, although in fairness and justice it was and is entitled to, such a judicial determination. *No court has as yet decided that the Commission's evidence in this case satisfies the statutory requirements under Section 2(a) of the Clayton Act as to the effect of the discrimination.*

The effect of this particular error on the part of the lower court, obviously is to deny to petitioner his day in court on the mere "ipse dixit" of the spokesman for an administrative agency whose order cannot under the circumstances of this case be said to have been subjected to judicial review.

This Court's denial of the petition serves to perpetuate the injustice to petitioner which should be remedied either by this Court's review of the evidence or by the remand of the case to the court below so that that court can make its determination on the evidence in this record.

The Solicitor General's admission in his brief that the lower court erred in this respect, and this Court's denial of certiorari, have now produced an anomalous and incongruous result, of which the petitioner is the victim. Although the lower court, in arriving at its conclusion, based it on a false premise, the Commission's evidence, consideration of which was not necessary under that false premise, is nonetheless now to be considered as sufficient to sustain its order on the Commission's own biased statement that it is sufficient. Here we have a startling innovation in judicial review of administrative orders.

The denial to petitioner of a judicial review of the sufficiency of the Commission's evidence is of such great importance to petitioner and to all American buyers and

sellers that this Court should reconsider its previous denial of certiorari and grant the writ so that the fundamental principle of judicial review may be preserved.

III

The Lower Court's Opinion Cannot Be Left Unreviewed: Its Error Must Be Proclaimed

This Court has apparently overlooked the fact that the opinion of the court below now stands as a precedent to other courts and American business with respect to the burden of proof under the Clayton Act as amended by the Robinson Patman Act. Despite the Solicitor General's admission in his brief that the court below erred on the question of the burden of proof, this Court's denial of certiorari leaves the lower court's opinion untouched.

This Court has often said that its denial of certiorari is not to be taken as a decision in favor of or against the decision below. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times" (*United States* v. *Carver*, 260 U. S. 482, 490).

Thus the opinion of the lower court remains as a precedent and supposedly a guide to American business, the Solicitor General's admission of error notwithstanding. Furthermore, the Solicitor General's admission of error is not necessarily binding on the Commission in future cases. The Commission may with impunity decide at a later date that it suits its purposes to follow the lower court's reasoning. There will be no expression of disapproval of the lower court's opinion on the books to stand in its way; nor will there be a decision of the Supreme Court proclaiming to American business that the Circuit Court erred when it ruled that the person accused of discrimina-

tion must prove affirmatively that he did not lessen competition.

This is a serious matter for the Court to consider, because we are dealing with a much invoked statute of vital consequence to American business and with a Commission which has been accused by this Court on occasion of sweeping "all our traditions into the fire" (*Federal Trade Commission* v. *American Tobacco Co.* 264 U. S. 298, 305).

IV

Section 2 (a) of the Clayton Act as Here Interpreted Is Unconstitutional—Does Not Foster, But Is Purposed to Destroy Competition.

Petitioner further submits that certiorari should have been granted because there is here involved the question of whether Section 2(a) of the Clayton Act, as interpreted by the Commission, is constitutional.

Prior to the amendment of the Clayton Act, the section prohibited price discrimination where the effect may be:

(a) "substantially to lessen competition" or

(b) "tend to create a monopoly."

The Robinson Patman Act of June 19, 1936 added a new "effect" clause making unlawful a price discrimination where the effect may be:

> "to injure, destroy or prevent competition with any person who grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

It is obvious that the case at hand does not fit under the so-called "old effect" clauses. Since there was no attempt to prove the state of competition within the industry —indeed competitive conditions were held by the Commis-

sion to be irrelevant (R. 858-874, 888-899) it can hardly be said that petitioner, a single stamp manufacturer, among thousands throughout the country, substantially lessened competition. Certainly petitioner's practices did not and could not possibly tend to create a monopoly! The only other statutory basis, therefore, upon which the order can be founded must be the "new effect" clause. This clause has not been judicially defined although American business is in the direct need of some definiteness on this score.

The Commission and the Solicitor General are of the opinion that the loss of a single sale of one rubber stamp (referred to for purposes of prosecution as a "diversion" of a sale) is sufficient to satisfy the statutory requirement of "injury." Petitioner asserts that if the "new effect" clause can be satisfied by showing that a competitor lost one sale because of the accused's lower price, then such interpretation takes the section outside the power of Congress under the commerce clause. The section cannot be deemed to be a regulation of commerce if the every day gain and loss of sales in the course of competition all over the United States can be an "injury" rendering the winner of the sale a violator of Section 2(a) of the Clayton Act, subject to a fine for contempt if repeated after an order has been affirmed.

Unless the prohibition of the statute is limited to the prevention of acts having some inimical effect upon interstate commerce, Congress would be without power to prohibit the acts as regulations of such commerce. Where the acts are declared to be illegal under this power, there must be some reasonable relation between the end sought to be attained and the prohibited means or the statute will fall. The congressional power to regulate commerce includes the power to prohibit but only where such prohibition is in aid

of the lawful protection of the public. (*cf. Hipolite Egg Co. v. United States,* 220 U. S. 45.)

Where in the Commission's interpretation of Section 2(a) is there anything in the public interest? Is the public helped by the absence of competition? The many statutes enacted to help keep competition free and unfettered demonstrate that the credo of America is competition and not the restraint of competition.

The "new effect" clause can, it is submitted, be interpreted in such a way as to be consonant with Congressional power and with the existing anti-trust and trade restraint laws, only if the indefinite word "injury" is construed to mean something akin to what the other two definite words in the series, "destroy" and "prevent" mean.

In the series of words used in the "new effect" clause, "to injure, destroy or prevent competition", "destroy" and "prevent" are definite. Where competition has been either destroyed or prevented the result is the same for there is then no competition. The word "injure" however, is wholly indefinite and covers an enormous range, from the lowest degree of harm to virtual destruction. It is a well settled and familiar rule in statutory construction, exemplified by the maxim "*noscitur a sociis*", that in such cases where "any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words." (*Virginia* v. *Tennessee,* 148 U. S. 503, 519.)

So applied, the word "injure" as used in the "new effect" clause must be held to mean a very substantial injury amounting virtually to destruction of competition. (See McLaughlin, "The Courts and the Robinson Patman Act." 4 Law & Contemporary Problems, 410, 414-415.) That is the only requirement which would be in the public

interest. Clearly the loss of one or a few orders—all that is here present—would not satisfy such requirement.

The same result would be accomplished by applying the proper rules of grammar and modifying the "new effect" clause by the word "substantially" that appears in the first clause.

To assert that the "diversion" of a single sale is compliance with the required effect under the amended section is to make that section unconstitutional as outside the power of Congress.

The question of the constitutionality of this "new effect" clause has not been raised in any other case but it is so very important and novel to all American business as to warrant, in and of itself, the granting of certiorari by this Court.

V

Section 2 (b) of the Clayton Act Violates the Due Process Clause (Fifth Amendment) of the Constitution

This case also involves the very serious question of whether Section 2 (b) which allows an accused to justify his discrimination if he can prove that

> "his lower price * * * was made in good faith to meet an equally low price of a competitor."

is a deprivation of liberty and property "without due process of law" in violation of the Fifth Amendment of the Constitution.

The amended section in compelling a person to *meet* a competitor's price and *not to beat it*, has enacted a law which promotes price fixing in its worst form rather than competition. In addition it is utterly impractical and absurd. American business has never been carried on that

way and never will be unless our form of government is destroyed.

The very life blood of our economy is competition and not its antithesis. The Clayton Act has been on the statute books since 1914 and it has been said of that statute that its great purpose was

> "to advance the public interest by securing fair opportunity for the play of contending forces ordinarily engendered by an honest desire for gain."
>
> (*Federal Trade Commission* v. *Sinclair Refining*, 261 U. S. 476.)

The amendment of Section 2 (b) effected by the Robinson Patman Act in June, 1936, abandons the very purpose of the statute. How can competition exist if a merchant cannot offer to undersell his competitor but can only meet his price. Can Congress destroy competition and pass a price-fixing law in the guise of an anti-discrimination statute? It seems to petitioner that such a question is merely rhetorical, the answer being so obviously no. Yet that is exactly what Congress has done in amending Section 2 of the Clayton Act.

Section 2 (b) also refers to fixing of a lower price in "good faith" to meet an equally low price. There is contained in the statute no definition of good faith, no standards by which this conduct can be gauged. A violation of a statute cannot constitutionally be made to depend on such an immeasurable, vague and uncertain standard. (*Cf. A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 531, 552.)

It has been held that the good faith requirement in Section 2(b) compels the seller to "investigate or verify" statements made by his buyer of competitors' prices. So interpreted, Section 2(b) stands as an unconstitutional challenge and defiance to the business methods pursued for

generations in the United States, where sales of merchandise have always been made to buyers on the assumption that the buyers and sellers are honest men.

It is outside the powers of Congress for it to legislate into the laws of trade of this country, a presumption that whenever a buyer informs a seller that he can buy for less, the buyer is *per se* a liar whose statement must be investigated by the seller. Furthermore, under such an interpretation, the seller would have to advise the proposed buyer that he must investigate his statement before he can make a sale to him, and to that end and purpose he must demand of the buyer, the name and address of the one who the buyer claimed would sell to him for less, before he can make a sale.

It would appear that to satisfy the statute, the seller must inquire of his competitors the prices at which they have agreed to sell the product and that he must inform his competitor that he intends to compete with him for the business. Of course, if the customer refuses to give the seller the name of the competitor, he must abandon all attempts to sell to this particular customer. If the customer gives him the competitor's name and if the seller finds out the competitor's price and he charges the same price, then he would be violating the Sherman Act, for he would be guilty of an agreement to fix prices to that particular customer.

Moreover, in the face of such insult and challenge to the buyer's integrity, can it be held that Congress intended that the buyers would be callous enough to give an order to a seller who demands such an investigation. It would seem to need no argument for the statement that the buyers of our country would not only refuse to buy from such an insulting seller, but would brand him as a person unfit to do business.

The foregoing, it is submitted, exposes the fact that this Court has apparently overlooked the serious constitutional question which is here involved.

VI

Lower Court's Opinion on Meeting Competition Confusing and Unintelligible; Offers No Guide to American Business Review Imperative.

The Court should feel obliged to grant certiorari for yet another reason. The lower court's opinion dealing with the statutory justification of price discrimination where it is claimed that the lower price was fixed in good faith to meet the equally low price of a competitor is so confusing, equivocal and ambiguous as to make it impossible for American business to understand its obligations under the amended Clayton Act.

Since this statute in many respects controls the conduct of all merchants doing business in interstate commerce, a court called upon to interpret it should advise the merchant what is or is not a violation of the statute. This is especially necessary where, as here, violations of an affirmed order issued under the statute can be punished as contempts.

How can a merchant know when he can in "good faith" lower his price. Neither the statute nor the lower court's opinion offers him any guide or method by which he can determine in advance whether he will be violating the law. For example, the lower court in its opinion wrote:

> "We agree that he must not undercut his competitors' price; but whether it is a condition upon the defense that he must know what that price is, is another question which we reserve. If in fact he does not undercut his competitors' price, *perhaps* he may escape, even though he does not know what that price is, though it is

> only by chance that he has not undercut it. That is to say, we need not now decide whether the phrase 'in good faith' means more than that the offer shall be made with actual intent to sell at the price named."

Such language would seem to disregard the penalties that may result from the disobedience of the statute and any order issued thereunder!

One would suppose that if the lower price did not undercut his competitors' price that the price discrimination would have had no effect on the competitor or competition and consequently that no violation would exist. Yet the court below says that in such a case "perhaps he may escape." What that means is incomprehensible and leaves American business no safeguards at all against the pitfalls of this drastic statute.

Further, the Circuit Court says that "good faith" means only that the seller must actually intend to sell at the price named. Since presumably the sale at the lower price took place—else Section 2(a) does not apply at all for there must actually be two *sales*, one at a lower and one at a higher price—the court's reference to the intention to sell at the quoted price is meaningless.

The Solicitor General himself tried to make sense out of this part of the lower court's opinion and decided to give up. For he stated in his brief that even if the lower court's reasoning was wrong, the question of good faith and meeting an equally lower price of a competitor had been discussed by this court in the *Staley* and *Corn Products* cases. Thus he wrote (p. 10):

> "Insofar as the *ratio decidendi* of the lower court differs from the foregoing later decisions by this Court (the Staley and Corn Products cases) the latter will be a guide to the court below in future cases involving defenses under Section 2(b)."

It should not be overlooked that the *Staley* and *Corn Products* cases deal not with ordinary instances of sales at different prices but with an unlawful basing point system of prices using phantom freights. Merchants who do not employ basing points and phantom freights should not be relegated to this court's opinions in those cases. This court there directed itself to a system that could operate only in violation of law. For inevitably some purchasers had to pay for freight they did not incur while others who incurred freight charges did not pay for them.

Here we have an ordinary merchant trying to sell his wares at such prices as he could get. If a buyer tells him a competitor has offered to sell at a lower price, the merchant cannot investigate the truth of that statement, he cannot appear naive enough to assume that he can question the buyer's veracity and still get an order. He must either offer to sell at a lower price or lose the order. If he gets the order, has he fixed his lower price in good faith? Certainly the lower court here has not answered this question though it was before it; nor, is it submitted, was it decided insofar as the ordinary merchant is concerned by this court in the basing point cases.

The lower court's opinion in this respect must not be allowed to stand unreviewed. Certiorari should be granted.

VII

The Solicitor General's Statement That The Staley and Corn Products Opinions Settled the Question of Price Discrimination Presented in the Instant Case Is Erroneous and May Have Unfairly Influenced This Court to Deny Certiorari.

The Solicitor General, at pages 9 and 10 of his brief, erroneously informed this Court that its opinions in the cases of *Federal Trade Commission* v. *Staley Manufactur-*

ing Co. and *Corn Products Refining Company* v. *Federal Trade Commission,* settled the question of competitive price discrimination involved in the instant case. The questions here concerned could not have been settled or even passed on in those cases for the unlawful method of selling the product there involved is absolutely foreign to the ordinary every-day sales practices involved in the instant stamp case.

In the *Staley* and *Corn Products* cases, there was involved the notoriously illegal phantom freight basing point system of selling which was directly aimed at the elimination of competition among buyers of a basic raw product, i.e., glucose, used in the manufacture of candy, and the illegal system was purposely designed to favor one buyer over another by reason of unearned preferential freight rates. The sub-headings in this Court's opinion in the *Corn Products* case, shows how completely different are the questions that were involved in the *Staley* and *Corn Products* cases, and in the instant case of the little manufacturer of made to order rubber stamps in a highly competitive industry where no monopolistic practices are present.

(1) "Basing Point Practices." No such practices were or could have been present in the instant case. Glucose is like coal and iron—a raw product. Little made to order rubber stamps are entirely different. They are not sold in car load lots at prices determined by freight basing points. As a matter of fact, some orders for stamps are as low as 75¢ for a complete order.

(2) "Booking practices." Glucose orders are booked in advance by options, etc. Under this practice some customers buying in tank wagon lots are favored, etc. etc. No such practice is or could be present in the sale of made to order rubber stamps.

(3) "Discounts to Purchasers of By-products." No by-products are involved in the sale of the little made to order rubber stamps.

(4) "Advertising Allowances" to favored customers. Such practices are not present in the made to order rubber stamp business.

In the *Staley* case it was held that there existed a slavish following of a pricing policy of systematic discriminations, and that it could not be said that the price discriminations resulted, as here in the instant case, in *lower* prices to meet equally low prices of a competitor.

In that case, too, the Court referred to the artificially high prices from the use of the basing point system. In the instant case there never were any artificially high prices. Every price charged by petitioner was an actual competitive price in a highly competitive business. The state of competition within the industry by its very nature, belies a monopoly or substantial lessening or destruction of competition.

This Court in its opinion in the *Staley* case also said that the statute "places emphasis on individual competitive situations." Consequently there can be no comparison between the situation where raw glucose in carload lots are sold on a basis of phantom freights and basing points and the sale of made to order rubber stamps.

This Court's opinions in the *Staley* and *Corn Products* cases dealing with the monopolistic and reprehensible pricing system and other untoward practices detrimental to the American system, furnish absolutely no assistance to the makers of made to order rubber stamps on how to obey this most drastic statute.

VIII

This Court Apparently Overlooked Fact That in Five of the Eight Instances of Discrimination, Stamps Were Sold by Sealed Secret Competitive Bids. Lower Court's Decision and Denial of Certiorari Doom Competitive Bidding.

It is not asserted that the lower court by its decision and this Court, by its denial of certiorari, intended to eliminate competitive bidding. But that is the result. The court will take judicial notice that the purchase of many articles of commerce are accomplished by a buyer calling for sealed secret competitive bids, the sale going to the lowest bidder. Indeed by statute, the federal government as well as states and cities, must purchase all their requirements in that fashion.

Ordinarily where the bidding is not collusive, a seller is unaware of his competitors' prices; he knows only that he will be competing with his competitors and will get the sale if his price is lowest. He cannot ask his prospective buyer for competitors' prices and certainly he cannot investigate or verify his competitors' prices. Moreover, unless he would violate the Sherman Act, he cannot inquire of his competitors for their prices and fix his price so as to meet their prices.

How then, can an honest and law abiding seller ever justify, under Section 2(b) of the Clayton Act, a lower price submitted in the form of a sealed, secret competitive bid? A seller who submits a lower price in anticipation of aggressive competition, will, if his price happens to undercut a competitor's price, be guilty of violating the Clayton Act. If his price meets that of his competitors he can be accused of violating the Sherman Act. Americans cannot do business on such a basis.

The Solicitor General, by a footnote to page 10 of his brief, says that the discussion of sealed bids is not here presented because petitioner offered such proof "as to only one of the numerous instances of discriminatory prices shown by the evidence." Such a statement is not correct. In the first place, there were not "numerous instances of discriminatory prices" but only *eight* solitary instances thereof. Secondly, there was proof offered that in five of those eight instances, the customers were sold on sealed bids (R. 1012, 1013).

The question of competitive bidding is of serious consequence in this case. A determination of this Court on this question of the effect of Section 2(b) of the Clayton Act on competitive bidding is furthermore of the utmost consequence to that great portion of American business who buy and sell by sealed, secret competitive bids.

IX

Lower Court's Approval of Commission's Refusal to Permit Proof of Meeting Competition Constitutes Serious Error. It Is Also Contrary to Direction Found in This Court's Opinion in Staley Case.

The Solicitor General in his brief casts aside petitioner's argument as to the Commission's exclusion of vital testimony as purely an evidentiary matter not warranting certiorari.

Petitioner tried very hard by its offer of proof to show that competitors offered to sell stamps at lower prices to the eight customers listed in the stipulation. The Commission's trial examiner excluded such testimony on the ground that the existence of competition was *irrelevant* (R. 890-899). In so doing he kept tight shut the mouths of the witnesses from whom the necessary evidence may have come.

The Circuit Court said the Commission should *not* have excluded the evidence but that it chanced that "no injustice" was done because, said that court, petitioner was not prepared to prove that its prices were no lower than its competitors. In saying this the lower court disregarded the facts that petitioner was stopped at the very threshold of his questioning, that petitioner's first step in that proof was to show that its competitors solicited sales from the eight companies referred to in the stipulation. The lower court erred grievously when it assumed that petitioner could not prove what it was given no opportunity to prove.

The question here involved is more than purely an evidentiary matter, as the Solicitor General phrases it. It concerns the absolute denial by a subordinate administrative agency of the right afforded by the statute to an accused company to prove its defense. Section 2(b) says specifically:

> "That *nothing* herein contained *shall prevent* a seller rebutting the prima facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor."

This Court also declared in the *Staley* case that this statutory defense is "a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination." In view of this statement it would appear to have been a serious oversight for this Court to deny certiorari and thus allow to stand the lower court's opinion which approved the Commission's failure to permit petitioner to present its evidence of this defense.

This Court said in the *Staley* case that "Congress has left to the Commission the determination of fact in each case whether the person charged with making discriminatory prices acted in good faith to meet a competitor's equally low prices. The determination of this fact from

the evidence is for the Commission." Yet in the instant case, by its denial of certiorari, the Court has permitted the Commission to exclude the very evidence which may deny to it the right to exercise its authority over the merchant so accused.

The examiner's exclusion of the very important evidence tending to prove the statutory defense, which was criticized but approved by the lower court, is of the utmost importance to every merchant engaged in interstate commerce. Administrative agencies have become so large a part of a merchant's commercial existence that the courts must be ever on the alert to limit its action to lawful channels.

The failure of an administrative agency to permit a party haled before it to prove a statutory defense is so serious a matter that such conduct may amount to a denial to it of a fair trial and consequently a deprivation of petitioner's liberty and property without due process of law. (*Morgan* v. *United States*, 304 U. S. 1; *Shields* v. *Utah, Idaho Central R. Co.*, 305 U. S. 177; *Montgomery Ward & Co.* v. *N. L. R. B.*, 103 F. (2) 147).

This Court's intervention herein by granting certiorari and reversing the lower court's approval of the exclusion of the evidence would give petitioner the opportunity to prove the defense which under the statute he must be permitted to do, and and would also have a most salutary effect on the conduct of administrative agencies.

Conclusion

It can be accurately said that the Solicitor General's admission, that the lower court's bases for its affirmance of the Commission's order were erroneous, emphasizes that petitioner has been deprived of its day in court. For that reason as well as the constitutional and other most impor-

tant and vital grounds set forth herein, this court should have granted certiorari and should now do so.

Petitioner submits that the extraordinary situation here involved entitles this case to this Court's review and opinion.

Respectfully submitted,

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I, Henry Ward Beer, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

HENRY WARD BEER.